In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 271

CASSIUS MARSELLUS CLAY, JR.,
a/k/a MUHAMMAD ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Since the brief in opposition was filed in this case, information has been received relating to electronic surveillance involving the petitioner. Accordingly, this memorandum is filed in order to make appropriate disclosure to the Court.

1. Although petitioner was not at any time the subject of electronic surveillance directed against him, on five occasions he did participate in conversations which were monitored at three places where surveil-

lance directed against others was being conducted. In one instance, the overhearing occurred in the course of the gathering of foreign intelligence information. In all instances, the surveillance was well before the time of the facts involved in this case. The overhearings of petitioner occurred in March, September and October of 1964 and in April and June of 1965. The petitioner's refusal to submit to induction, for which he was convicted, took place on April 28, 1967.[1]

2. We recognize that, as a general rule, once the government has admitted that a defendant's conversations have been overheard, the proper procedure is for the Court to remand the case to the district court for a hearing to determine whether the prosecution used any leads or evidence obtained from the overhearing of those conversations. We submit, however, that this case presents a peculiar fact situation in which this Court can determine by an examination of the record that the overhearing of petitioner's conversations could not possibly have had any effect on the prosecution.

Petitioner was indicted and convicted for failing to submit to induction, an act which took place in the presence of officers of the United States Armed Forces and which petitioner both predicted and reported to the public press. At the trial, the government called only four witnesses; three of them testified about petitioner's arrival at the induction center and his re-

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[1] Petitioner's claim that he was a conscientious objector was not made until February 1966 and he did not assert a claim of ministerial exemption until August 1966.

fusal to submit to induction and the fourth merely identified petitioner's Selective Service file, which was then introduced into evidence. Thus, it is clear that nothing obtained by overhearing petitioner's conversations was used to convict petitioner; the evidence against him came only from those who in the normal course of their duties were present when petitioner publicly refused to submit to induction.

Moreover, an examination of the Selective Service file, which is part of the record before the Court, conclusively establishes that the denials of petitioner's claims for conscientious objector and ministerial classification were not predicated on information obtained as a result of overhearing any of petitioner's conversations. The evidence that petitioner was not entitled to such exemptions came from an examination of the tenets of his religion, as found in the published works of its leaders, and from his own statements, which were contained in documents and testimony he submitted to support his claims and in published newspaper interviews (See Brief in Opposition in this case, pp. 6-10). While the Selective Service file does contain a summary of interviews conducted by the F.B.I. of some of petitioner's neighbors, friends, business associates and relatives, these people all spoke highly of petitioner and none of them provided any information that would have supported a denial of his claims.[2] Thus, even if it were assumed *arguendo* that

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[2] Only one person interviewed, a former high school teacher of petitioner, stated that he doubted the sincerity of petitioner's religious claims. But he gave no specific factual information to support this claim. Moreover, since petitioner's

the F.B.I. had learned the identity of these people only by overhearing petitioner's conversations, it is clear that none of them provided evidence against petitioner.[3]

3. In this situation, we submit that the overhearing of petitioner's conversations could not have produced any of the evidence used to convict him for violating the Selective Service law; and that, whatever may be the decisions in *Alderman* v. *United States*, No. 133, O.T., 1967, and *Ivanov* v. *United States*, No. 11, and *Butenko* v. *United States*, No. 197, this Term, there would be no occasion to remand this case to the district court for further proceedings to consider the effect of the overhearings upon petitioner's conviction. Should the Court disagree with us, however, it would then be appropriate to defer action on the present petition until those cases are decided.

4. The question may well be asked why this surveillance was not discovered at an earlier date. The answer is simply that it is not the practice to check for the possibility of such surveillance in this type of

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high school record was checked and other teachers were interviewed, it is clear that this interview resulted from normal procedures in such cases and that this individual's identity was not learned by overhearing petitioner's conversation.

[3] While the report also sets forth information from a confidential source that the male members of petitioner's religion are given military instruction, petitioner and another witness both testified at the hearing on his claim of exemption that this was only training in self-defense and that there was no thought of actually engaging in any type of war. This testimony was never questioned.

Selective Service case, because the refusal to submit to induction is a public act and there would be no reason to use electronic surveillance to obtain proof of that act.

In this case, the facts relating to the refusal to submit to induction were reported by the Selective Service Board to the United States Attorney in Houston, who instituted prosecution on those facts. When the petition for certiorari was filed, the matter initially was handled by the Appellate Section of the Criminal Division in the Department of Justice, which instituted a check for possible electronic surveillance. The response to this inquiry did not arrive until after the brief in opposition had become due. Shortly thereafter, however, the information was received and disclosure is accordingly made in this memorandum.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 O-317855 136